Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts?

Havu, Katri Annikki

2018

Havu , K A 2018 , ' Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts? ' , European law review , vol. 43 , no. 1 , pp. 24-46 .

http://hdl.handle.net/10138/308556

Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts?

Havu, K.

This is a pre-copyedited, author-produced version of an article accepted for publication in European Law Review following peer review. The definitive published version (Havu, K., Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts? 2018, European law review 43, 1, p. 24-46) is available online on Westlaw UK or from Thomson Reuters DocDel service.

Full, Adequate and Commensurate Compensation for Damages under EU Law: A Challenge for National Courts?

Katri Havu[*]

University of Helsinki

Abstract

This article studies full, adequate and commensurate compensation in EU case law, especially in preliminary rulings by the European Court of Justice. These terms, meant to convey that damages liability for infringements of EU law should be sufficient, are open to interpretation and in practice gain meaning from other concepts such as recoverable damage. Aspects of the extent of reparation are obscure under EU law and relevant emphases of the functions of damages liability – for example, is damages award underpinned by corrective justice or deterrence thinking – are not always clear. National courts dealing with liability issues relating to breaches of EU law must combine EU and national law while evaluating what kind of liability is required. Whether the open nature of the relevant EU law is a problem is open to debate. From a broader perspective, the issue relates to balancing between harmonisation and divergence in the context of the private law effects of breaches of EU law. Requiring full or otherwise sufficient compensation should not be thought to lead to uniform liability across the Union without further clarification of central matters pertaining to, for instance, relevant damage and causal link.

Introduction

EU law[1] relies on the systems of Member States for enforcement, remedies and procedural rules. National laws and judicial systems play an essential role filling gaps in EU law.

Arts 19(1) and 4(3) of the Treaty on European Union (TEU) require that national judicial systems be used for resolving EU law-based claims and that the goals of Union law are duly respected. The general principles on the effects of EU law in Member States, such as primacy and direct effect, as

[*] Adjunct Professor of European Law, University of Helsinki. The author wishes to thank research assistants Tone Knapstad, Daniel Wyatt and Suvi Kurki-Suonio for their invaluable support and Christopher Goddard for language editing. Thanks are also due to the peer reviewers. Any errors in the article are those of the author.

[1] The term *EU law* refers to the whole of the law of the European Union: no distinction is made in the text between EC or Community law and EU law.

well as the "procedural autonomy principles" of effectiveness and equivalence, form part of the framework for dealing with EU law cases in national courts, as do the requirements relating to sanctions.[2] Moreover, the requirement that EU law gains its full effect (*effet utile*) or its intended effects guides national courts.[3] Additionally, the principle of, and right to, effective judicial protection, now also enshrined in art.47 of the Charter of Fundamental Rights of the EU, imposes demands on national systems.

These "limits of acceptability" – not that easily combined and applied – leave room for manoeuvre within national systems. This means that national courts may deal with different details of claims as they see fit, as long as EU law is silent on the matter, other EU law is not infringed and the above-mentioned principles are respected.[4] National courts hear claims concerning Member State liability (a type of vertical liability[5]) and private liability for infringements of EU law (horizontal liability). Commonly, national rules are relatively central and to a significant extent affect case outcomes.[6] Of

[2] To highlight some illustrative cases, see, e.g. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (26/62) EU:C:1963:1; *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (33/76) EU:C:1976:188 at [5]; *Johnston v Chief Constable of the Royal Ulster Constabulary* (222/84) EU:C:1986:206 at [18], [53]; *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* (C-432/05) EU:C:2007:163 at [36]–[44]; *Pontin v T-Comalux SA* (C-63/08) EU:C:2009:666; *Nike European Operations Netherlands BV v Sportland Oy* (C-310/14) EU:C:2015:690.

[3] In addition to the previous fn., see, e.g. *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (106/77) EU:C:1978:49 at [17]–[24]; *Impact v Minister for Agriculture and Food and Others* (C-268/06) EU:C:2008:223 at [40]–[55]; *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* (C-409/06) EU:C:2010:503 at [53]–[58].

[4] See further, e.g. S. Prechal and R. Widdershoven, "Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection" (2011) 4 *Review of European Administrative Law* 31; A. Arnull, "The Principle of Effective Judicial Protection in EU law: An Unruly Horse?" (2011) 36 E.L. Rev. 51; A.-M. Van den Bossche, "Private Enforcement, Procedural Autonomy and Art.19(1) TEU: Two's Company, Three's a Crowd" (2014) 33 *Yearbook of European Law* 41. See also A. Wallerman, "Towards an EU law Doctrine on the Exercise of Discretion in National Courts? The Member States' Self-Imposed Limits on National Procedural Autonomy" (2016) 53 C.M.L. Rev. 339.

[5] The other type of vertical liability is damages liability of the EU, dealt with by the EU Courts.

[6] As regards commentary see, in particular, N. Reich, "Horizontal Liability in EC law: Hybridization of Remedies for Compensation in Case of Breaches of EC Rights" (2007) 44 C.M.L. Rev. 705; C. Van Dam, *European Tort Law,* 2nd edn (OUP, 2013), pp.49, 370–372; K. Havu, "Horizontal Liability for Damages in EU Law—the Changing Relationship of EU and National Law" (2012) 18 *European Law Journal* 407; P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials,* 6th edn (OUP, 2015), pp.226–265; M. Wissink, "Overview" in H. Koziol and R. Schulze (eds), *Tort Law of the European Community* (Springer, 2008), pp.341, 342–346; F.G. Wilman, "The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the

course, in matters where specific EU rules on damages exist, these particular norms and any national implementing legislation must be duly applied. Nonetheless, EU law does not exhaustively regulate damages liability on many themes, such as Member State liability or liability related to particular fields of law such as equality in employment, intellectual property and competition, even though some aspects of the required liability have been discussed and resolved in EU law.[7]

There is a preponderance of case law where potential national solutions regarding damages liability are discussed and guidance on "EU law compatibility" is given by the European Court of Justice (ECJ) as a result of preliminary ruling requests. The ECJ has often remarked, using different expressions, that EU law requires compensation to be appropriate and to cover a sufficient amount of the harm incurred. National courts should understand and apply these requirements in line with the way their meaning is explained or otherwise observable in EU law.[8] Nevertheless, to cite just one example, "adequate compensation" may be a significantly vague guideline for national judiciaries if detailed explanations for the expression are missing.

Indeed, demands such as those for "adequate" or "commensurate" compensation may be understood differently by different national courts because the practical significance of the requirements may be affected by surrounding rules and conceptions of damages liability, especially regarding legally relevant damage and causal link. These issues have scarcely been elaborated in EU law. The actual outcomes necessitated by the EU law requirements for sufficient compensation must be deduced without full support from EU law, using gap-filling national law in the process. In concrete cases, different national courts may consider different amounts of compensation as sufficient and EU law-compatible. Whether a liability decision complies with EU law may be an intricate matter.

Main Remedies it Provides for" (2016) 53 C.M.L. Rev. 887, 896–909; M. Künnecke, "Divergence and the Francovich Remedy in German and English Courts" in S. Prechal and B. van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (OUP, 2008), p.233. See also, e.g. D. Leczykiewicz, "Private Party Liability in EU Law: In Search of the General Regime" in C. Barnard and O. Odudu (eds), *Cambridge Yearbook of European Legal Studies, Vol 12, 2009–2010* (Hart, 2010), p.257.

[7] See, e.g. *Fuß v Stadt Halle* (C-429/09) EU:C:2010:717 on Member State liability; *Paquay v Société d'architectes Hoet + Minne SPRL* (C-460/06) EU:C:2007:601 on equality in employment; *Hansson v Jungpflanzen Grünewald GmbH* (C-481/14) EU:C:2016:419 on compensation related to Regulation 2100/94 on Community plant variety rights [1994] OJ L227/1; *Kone AG and Others v ÖBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317 on competition restriction damages liability. See also e.g. *Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV* (C-139/11) EU:C:2012:741 on airline passengers.

[8] As is well known, concepts of EU law are autonomous. See, e.g. *Nokia Corp v Wärdell* (C-316/05) EU:C:2006:789 at [21] with the case law cited; Opinion of Advocate General (AG) Wathelet in *Nikolajeva v Multi Protect OÜ* (C-280/15) EU:C:2016:293 at [42], [53].

In this study, the intention is to study the requirements for full, adequate and commensurate compensation. These terms seem to be in relatively frequent use when the appropriate extent of liability is under discussion in preliminary rulings by the ECJ.[9] A common denominator for these notions is that, as autonomous concepts of EU law, their origin lies in EU case law (of course, in Member State systems, similar notions have existed previously). Based on a close examination of the use of the concepts in particular cases, remarks are presented on the implications of these requirements. Accordingly, this study discusses the room for manoeuvre still left for national systems and the potential intricacies in determining what kinds of decisions on damages liability comply with EU law. Whereas this article focuses only on certain concepts, it is noteworthy that ambiguities and findings similar to those presented here may be relevant in the context of other requirements on sufficiency of damages liability or other compensation under EU law.

This analysis illustrates that the requirements for full, adequate or commensurate compensation are vague, even though prima facie highly relevant. Vitally, they could gain further content from EU law definitions of recoverable damage and legally relevant causal connection. However, EU law on these themes is also other than exhaustive. Matters pertaining to the extent of damages liability are barely discussed in detail by the ECJ. Moreover, in cases which are primarily heard by national courts, deciding on the extent of liability is constantly left to the referring courts with superficial guidance and general references, in particular, to the procedural autonomy principles of effectiveness and equivalence, and to the full effect of EU law.[10]

[9] See as to full compensation or reparation (in French: *compensation intégrale* or *réparation intégrale*; in German: *vollständiger* [*Schaden*]*Ersatz*), e.g. *Bundeswettbewerbsbehörde v Donau Chemie AG and Others* (C-536/11) EU:C:2013:366 at [24]; art.3 of Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1. As to adequate compensation or reparation (in French: *reparation ... adéquate*; in German: *Wiedergutmachung ... angemessen* or *angemessen wiedergutgemacht*), see, e.g. *Palmisani v INPS* (C-261/95) EU:C:1997:351 at [35]; *Paquay* (C-460/06) EU:C:2007:601 at [46]. As to commensurate compensation or reparation and commensurateness with damage (in French: *réparation ... adéquate* [*au préjudice subi*]; in German, e.g.: *Ersatz ... angemessen*), see, e.g. *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* (C-46/93 and C-48/93) EU:C:1996:79 at [82]; *Fuß* (C-429/09) EU:C:2010:717 at [92], [98]. Similar expressions observable in EU law include, e.g. "appropriate" (e.g. art.12(2) of Directive 2004/80 relating to compensation to crime victims [2004] OJ L261/15) and "fair" (e.g. *Hewlett-Packard Belgium SPRL v Reprobel SCRL* (C-572/13) EU:C:2015:750 and the secondary legislation cited) compensation. See also, e.g. M. Weitenberg, "Terminology" in H. Koziol and R. Schulze (eds), *Tort Law of the European Community* (Springer, 2008), pp.309, 321–323.

[10] For earlier criticism of developing private law aspects of EU law by means of fragmentary case law, see, e.g. W. Van Gerven, "The ECJ Case-Law as a Means of Unification of Private Law", in A. Hartkamp et al (eds), *Towards a European Civil Code,* 3rd edn (Kluwer, 2004), p.101.

The next Section maps out how notions of adequate, commensurate and full compensation are discussed in EU case law. The focus of this study is on the guidance given to national courts in preliminary rulings, and related cooperation between EU and national law. However, other EU-level case law is also reviewed in order to sketch a full picture of the connotations of the concepts. This analysis of case law focusing on full, adequate and commensurate compensation as matters of EU law appears to be the most comprehensive and up-to-date piece published to this point.

Concepts of Adequate, Commensurate and Full Compensation in Case Law: A Concise Overview

Adequate and Commensurate Compensation

The first reference to *adequate* or satisfactory compensation appeared in early case law (the relevant expression concerning sufficiency of reparation being, in the working language of the ECJ and the original language of the case, French, "*satisfactoire*").[11] However, the notion appears to have been genuinely discussed for the first time in *Von Colson*, one of the many judgments on equality in employment to comment on sufficiency of compensation. The ruling entails mixed remarks on sanctioning breaches of relevant law and on reparation, which, too, is characteristic of the cases in the field. The ECJ noted, for instance, that where a Member State

> "chooses to penalize the breach ... by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained". (– The English translation may not be the most accurate: the relevant wording reads in French "… *adéquate au préjudice subi*", and in the language of the case, German, "… *in einem angemessenen Verhältnis zum erlittenen Schaden*".)[12]

The ECJ further stated that adequacy (or appropriateness) in relation to damage signified that compensation must amount to more than purely nominal compensation, that is, more than, for example, merely reimbursing the costs of applying for a job. It was for the national court to apply the law to the facts in light of the requirements of EU law.[13]

In *Marshall II*, where the language of the case was English, *Von Colson* was referred to and the concept of adequacy elaborated upon, with the ECJ noting that:

> "Where financial compensation is the measure adopted ... it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be

[11] See *Fiddelaar v Commission* (44/59) EU:C:1960:47.

[12] *Von Colson and Kamann v Land Nordrhein-Westfalen* (14/83) EU:C:1984:153 at [23]. A more direct translation could be "appropriate" or "suitable" in relation to the damage.

[13] *Von Colson* (14/83) EU:C:1984:153 at [28].

made good in full in accordance with the applicable national rules." (Relatively similarly in French "*... adéquate en ce sens qu'elle doit permettre de compenser intégralement les préjudices effectivement subis du fait du licenciement discriminatoire, selon les règles nationales applicables*.")[14]

The ruling in *Marshall II* banned a fixed upper limit on compensation and required that interest be awarded together with compensation.[15]

A sexual harrasment staff case nevertheless illustrates that compensation may be adequate or sufficient (in French "*réparation adéquate*") without financial compensation if other measures taken can be taken to have remedied the harm suffered.[16] A similar approach is observable in some other cases as well, especially as to the relationship between the EU and its officials.[17]

Commensurateness of reparation was highlighted by the ECJ in the *Brasserie* Member State liability ruling in 1996. One of the two languages of the joined cases was English, and it was stated in the ruling that:

> "Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights." (In French, though, again "*... adéquate au préjudice subi, de nature à assurer une protection effective de leurs droits*.")[18]

The ECJ noted that in the absence of EU law it is for Member States to "set the criteria for determining the extent of reparation", complying with the principles of equivalence and effectiveness.[19] While touching upon several issues of relevant damage, the guidance provided by the ECJ was relatively open-ended.[20] In any case, it was underlined that the *total exclusion* of loss of profit as a head of damage for which reparation may be awarded is incompatible with EU law and the principle of effectiveness:

[14] *Marshall v Southampton and South-West Hampshire Area Health Authority* ("*Marshall II*") (C-271/91) EU:C:1993:335 at [26]. See also, e.g. *Draehmpaehl v Urania Immobilienservice OHG* (C-180/95) EU:C:1997:208 (at [25]: "adequate in relation to the damage sustained"; in French "*adéquate au préjudice subi*"; in the language of the case, German "*in einem angemessenen Verhältnis zum erlittenen Schaden*").

[15] *Marshall II* (C-271/91) EU:C:1993:335 at [30]–[32], [38].

[16] *Campogrande v Commission* (C-62/01 P) EU:C:2002:248; *Campogrande v Commission* (T-136/98) EU:T:2000:281.

[17] E.g. *Hectors v European Parliament* (C-150/03 P) EU:C:2004:555 at [56]–[62].

[18] *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [82]. In German, the other language of the case "*... dem erlittenen Schaden angemessen ...*". See also at [90].

[19] *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [83].

[20] *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [84]–[86], [88]–[96].

> "[e]specially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible."[21]

The ruling and its statements on sufficiency of compensation have frequently been cited in later cases.

The Member State liability judgments in *Palmisani, Maso* and *Bonifaci* recalled the statements by the ECJ on commensurate (in French "*adéquate*", and in Italian, the language of the cases, "*adeguato*") compensation in *Brasserie*. It was explained that national courts must ensure adequate ("*adéquate*"; "*adeguato*") reparation complying with the requirements of EU law such as the twin principles of procedural autonomy. A central message, even though not fully consistent, was that all the (recoverable) loss established by claimants as caused by the fact that they were unable to benefit from a Directive must be made good.[22] This, nonetheless, leaves much in the hands of national law as well as in the evaluation by a domestic court of the conditions for damages liability.

In the Member State liability case of *A.G.M.-COS.MET*, the ECJ recalled *Brasserie* and again discussed compensation commensurate or adequate in relation to the damage suffered (in French "*réparation ... adéquate au préjudice subi*"). As regards the extent of reparation, the role of national law remained central, the principle of effectiveness and its specific interpretation in *Brasserie* functioning as a guideline:

> "[T]he compensation ... must be commensurate with the loss or damage sustained. ... [I]t is for ... each Member State to set the criteria for determining the extent of compensation, but those criteria cannot be less favourable than those applying to similar claims or actions based on domestic law and must in any event not be such as in practice to make it impossible or excessively difficult to obtain redress. National legislation which generally limits the damage for which compensation may be granted to damage done to certain specifically protected individual interests not including loss of profit ... is not compatible with Community law ... [T]otal exclusion of loss of profit as a head of damage for which compensation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the

[21] *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [87].

[22] *Palmisani* (C-261/95) EU:C:1997:351 at [25]–[27], [34]–[35]. At [26]: "it follows from [*Brasserie* (C-46/93 and C-48/93) EU:C:1996:79] that reparation must be commensurate with the loss or damage sustained ..." At [35]: "It is for the national court to ensure that reparation of the loss or damage sustained ... is adequate. Retroactive and proper application in full of the measures implementing the Directive will suffice ... unless the beneficiaries establish the existence of complementary loss sustained on account of the fact that they were unable to benefit ... from the financial advantages guaranteed by the Directive with the result that such loss must also be made good." Similarly: *Maso and Others and Gazzetta and Others v INPS and Repubblica italiana* (C-373/95) EU:C:1997:353 at [36]–[42]; *Bonifaci and Others and Berto and Others v INPS* (C-94/95 and C-95/95) EU:C:1997:348 at [48]–[54].

> context of economic or commercial litigation, such a total exclusion of loss of profit is liable to make it impossible in practice for damage to be compensated."[23]

In the language of the case, Finnish, the wording which concerns commensurateness with the damage is "*vastattava aiheutunutta vahinkoa*",[24] which may be translated as requiring that the compensation corresponds to or equals the damage sustained. In both *A.G.M.-COS.MET* and *Brasserie*, the referring courts actually made inquiries about *full compensation*, but the ECJ did not explicitly discuss the concept itself or detailed requirements based on it: the Court discussed commensurateness with damage and prohibited categorical exclusion of certain losses.[25]

In the employment equality case of *Paquay*, the ECJ noted, in the context of requirements based on secondary legislation, that measures to restore equality "must guarantee real and effective judicial protection and have a real deterrent effect".[26] Even though Member States enjoy discretion when legislating on measures and deciding on claims, "the measure ... must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered" (in French, which is also the language of the case, "... *adéquate au préjudice subi*").[27] Additionally,

> "[w]here financial compensation is the measure adopted ... it must be adequate, in that it must enable the loss and damage actually sustained ... to be made good in full in accordance with the applicable national rules" (relatively similarly: "... *adéquate en ce sens qu'elle doit permettre de compenser intégralement les préjudices effectivement subis* ...").[28]

In *Pontin*, the ECJ repeated, citing *Paquay*, that,

> "the measure chosen must be such as to ensure effective and efficient legal protection, must have a genuine dissuasive effect ... and must be commensurate with the injury suffered" (in French, which is also the language of the case, again "... *adéquate au préjudice subi*").[29]

The reasoning continued with guidance on judicial protection and the twin principles of procedural autonomy but without further hints about the meaning of being commensurate with the injury.[30] As with several earlier cases, *Paquay* and *Pontin* do not provide detailed guidance on evaluating whether

[23] *A.G.M.-COS.MET Srl v Suomen valtio and Lehtinen* (C-470/03) EU:C:2007:213 at [94]–[95], see also [91]–[96].

[24] *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213 at [94].

[25] The preliminary ruling questions: *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213 at [40]; *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [8], [14].

[26] *Paquay* (C-460/06) EU:C:2007:601 at [45]. The ECJ also cited *Marshall II* (C-271/91) EU:C:1993:335.

[27] *Paquay* (C-460/06) EU:C:2007:601 at [49].

[28] *Paquay* (C-460/06) EU:C:2007:601 at [46]. The ECJ cited *Marshall II* (C-271/91) EU:C:1993:335.

[29] *Pontin* (C-63/08) EU:C:2009:666 at [42].

[30] *Pontin* (C-63/08) EU:C:2009:666 at [43]–[76].

compensation is adequate or commensurate from the perspective of harm or, for instance, on how to determine the exact extent of relevant harm.[31]

The Member State liability ruling in *Fuß* recalled *Brasserie* in terms of requiring that compensation be commensurate with the loss or damage sustained (in French again "*adéquate au préjudice subi*", and in German, the language of the case, "*dem erlittenen Schaden angemessen*") "so as to ensure the effective protection of ... rights", while underlining that resolving the extent of reparation in detail was a task for national law and courts within the limits set by EU law.[32] In this case, which concerned secondary legislation on the protection of employees, reparation could take the form of additional time off or financial compensation, and even the form of compensation was to be determined by the national court.[33]

In *Arjona Camacho* the ECJ again made remarks on adequate and full compensation in an equality case.[34] Like, for example, *Marshall II*, the case suggests that compensation is adequate (or appropriate) when it is full. In addition to the English language version, this is observable in the French version and, for example, in the language of the case, Spanish.[35]

In *Irimie*, in the context of repayment of a tax levied by a Member State in breach of EU law, it was noted that the principle of effectiveness required that national rules on the calculation of interest should not lead to depriving the taxpayer of "adequate compensation" (in the French version "*indemnisation adéquate*") for loss incurred through undue payment of tax. A system limiting interest to that accruing from the day following the date of claim for tax unduly levied failed to meet the requirement. Loss relating to unduly levied tax was noted to occur during the period between undue payment of tax and repayment thereof.[36]

Moreover, additional case law employs the notion of adequate compensation, but without providing clear further hints about its meaning.[37]

[31] See, however, *Paquay* (C-460/06) EU:C:2007:601 at [49]–[55] regarding comparability of consequences when infringing different rules.

[32] *Fuß* (C-429/09) EU:C:2010:717 at [92]–[94], [98].

[33] *Fuß* (C-429/09) EU:C:2010:717 at [94]–[98].

[34] *Arjona Camacho v Securitas Seguridad España, SA* (C-407/14) EU:C:2015:831.

[35] *Arjona Camacho* (C-407/14) EU:C:2015:831 at [33]–[45]. See also Opinion by AG Mengozzi EU:C:2015:534 at [18]–[53].

[36] *Irimie v Administraţia Finanţelor Publice Sibiu and Administraţia Fondului pentru Mediu* (C-565/11) EU:C:2013:250 at [26]–[29]. The language of the case is Romanian and the relevant expression "*despăgubire adecvată pentru pierderea suferită*" ("adequate compensation for the loss suffered").

[37] E.g. *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers* (C-20/00 and C-64/00) EU:C:2003:397 at [62]; *Kingdom of the Netherlands v Commission* (C-293/00) EU:C:2003:593 at [21], [33]; *Commission v Italian Republic* (C-518/06) EU:C:2009:270 at [74]–[82]; *European Ombudsman v Staelen* (C-337/15 P) EU:C:2017:256 at [128]–[131].

Several of the judgments discussed in this Section illustrate that terminological variation between "adequate" and "commensurate" compensation may be observable in the English versions, but not necessarily in the French versions or in the original languages of the cases when other than English.[38] This matter will be discussed further when analysing the connotations of the expressions.

Full Compensation

The notion of *full* compensation seems to have been used for the first time by the ECJ in the 70s. In 1972, a judgment on non-contractual liability of the European Economic Community (EEC) included the term (in French in this case, "*compensation totale*") but did not engage in a discussion about its meaning.[39] In later cases, full compensation (in French often "*compensation intégrale*" or "*réparation intégrale*") has to some extent been elaborated. Some of the ECJ's remarks have already been noted above in discussing use of the terms "adequate" and "commensurate" compensation.

The requirement of full compensation has also appeared in EU secondary law and was famously included in Directive 2014/104 on competition restriction damages claims.[40] The interpretation of concepts in particular legislation is discussed briefly in the analysis part of this contribution, along with the prospective significance from the standpoint of "general concepts" of EU law.

With respect to preliminary rulings, full compensation was mentioned, for example, in the discrimination case of *Levez*, in which it was held that application of a national rule limiting an employee's entitlement to arrears of remuneration or damages to a period of two years prior to the date on which the proceedings were instituted would be incompatible with EU law if another available remedy was problematic from the perspective of the principle of equivalence. Nevertheless, the ECJ focused on the principles of effectiveness and equivalence and on the full effectiveness of the relevant secondary legislation without explicitly exploring the notion of full compensation further.[41]

In *Marshall II* and *Metallgesellschaft*, where it was underlined that interest is an essential component of compensation for the purposes of restoring the situation as required by particular

[38] See also fn.9.

[39] See *Compagnie d'approvisionnement, de transport et de crédit SA and Grands Moulins de Paris SA v Commission* (9/71 and 11/71) EU:C:1972:52 at [34].

[40] Directive 2014/104 on certain rules governing actions for damages for infringements of competition law [2014] OJ L349/1. Art.3 is entitled "Right to full compensation". Art.3(2): "Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest." See also, e.g. recital 13: "Without prejudice to compensation for loss of opportunity, full compensation ... should not lead to overcompensation, whether by means of punitive, multiple or other damages."

[41] *Levez v Jennings (Harlow Pools) Ltd* (C-326/96) EU:C:1998:577 at [22], [32]–[34], [37], [51], [53].

infringed EU law (concerning equality in employment and non-discrimination in taxation of companies), full compensation was discussed by noting that its calculation cannot leave out such factors as the effluxion of time which could, if ignored, reduce the value of compensation.[42] *Metallgesellschaft* illustrated that reparation required by EU law may in some cases be mere interest and refusing it could be problematic from the perspective of the principle of effectiveness and full effect of EU law.[43]

In the occupational disease and EEC liability case of *Lucaccioni*, the ECJ observed that full compensation was a different matter from excessive (double) compensation (noting in French, which is also the language of the case: "*une indemnisation complète, et non double*").[44]

In *Manfredi* and *Courage*, the possibility to seek compensation for damage caused by competition infringements was considered necessary from the perspectives of the full effect of EU competition provisions and the victims of damage. National procedural autonomy and national law on, for instance, causation and recoverable damage were left to play a central role in preliminary ruling proceedings.[45] The concept of full compensation was not explicitly used. Nevertheless, in *Manfredi*, what should be compensated was roughly elaborated. In this case, it was noted, by reference to *Marshall II* and *Brasserie* amongst others, that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) and interest. The ECJ essentially repeated its view on the inappropriateness of excluding lost profit.[46] In the same line of case law, *Kone* clarified that even damage potentially suffered by so-called umbrella customers could not be categorically excluded from the scope of the damages liability of infringers.[47] In *Donau*

[42] See *Marshall II* (C-271/91) EU:C:1993:335 at [28]–[32]; *Metallgesellschaft Ltd and Others v Commissioners of Inland Revenue and HM Attorney General* (C-397/98 and C-410/98) EU:C:2001:134 at [90]–[95].

[43] *Metallgesellschaft* (C-397/98 and C-410/98) EU:C:2001:134 at [90]–[95]. See also Opinion by AG Fennelly EU:C:2000:431 at [46]–[48], [50], [56].

[44] *Lucaccioni v Commission* (C-257/98 P) EU:C:1999:402 at [22]. See also *Leussink and Others v Commission* (169/83 and 136/84) EU:C:1986:371 at [11]–[14].

[45] See *Manfredi and Others* (C-295/04–C-298/04) EU:C:2006:461 at [59]–[64], [90]–[100]; *Courage Ltd v Crehan* (C-453/99) EU:C:2001:465. See further, e.g. S. Drake, "Scope of Courage and the Principle of 'Individual Liability' for Damages: further Development of the Principle of Effective Judicial Protection by the Court of Justice" (2006) 31 E.L. Rev. 841; Havu, "Horizontal Liability" (2012) 18 *European Law Journal* 407.

[46] *Manfredi* (C-295/04–C-298/04) EU:C:2006:461 at [90]–[100]. See from earlier case law *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79; *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213.

[47] *Kone* (C-557/12) EU:C:2014:1317. Nevertheless, *Europese Gemeenschap v Otis NV and Others* (C-199/11) EU:C:2012:684 mentioned that the causal link between the infringement and damage should be "direct" (at [65], in French "*un lien direct*" and in the language of the case, Dutch, "*een rechtstreeks verband*"). Thus, the guidance on relevant damage and sufficient causal connection appears partially contradictory. See also K. Havu, "Practical Private Enforcement: Perspectives from Finland—Causal Links, the Principle of Effectiveness and

Chemie and *CDC Hydrogen Peroxide*, remarks on the possibility of seeking full compensation were made without explaining the concept other than by references, in *Donau Chemie*, to earlier competition infringement damages cases.[48]

Some other contemporary cases also illustrate the significant role of national law, and of the principles of procedural autonomy, in terms of details relating to the extent of liability.[49]

In *Arjona Camacho*, an equality case discussed earlier, the ECJ explained full as well as adequate compensation as compensation for "loss and damage actually sustained" (similarly in French "*les préjudices effectivement subis*", and in the language of the case, Spanish, "*los perjuicios efectivamente sufridos*").[50]

Hansson concerned "reasonable compensation" (art. 94(1)) and additional compensation for *further damage* (art. 94(2)) due to an infringement of the Community plant variety rights Regulation 2100/94.[51] The ECJ stated, in particular, that:

> "Article 94 ... establishes ... an entitlement to compensation which not only is full but which also rests on an objective basis, that is to say, it covers solely the damage ... sustained as a result of the infringement. (Along the same lines in French "*... qui est, non seulement intégral, mais qui repose, en outre, sur une base objective, à savoir qu'il couvre uniquement le préjudice resultant ...*", and in the language of the case, German, "*... der nicht nur vollständig ist, sondern zudem auf einer objektiven Grundlage beruht, denn er erfasst allein den Schaden ...*".)[52]

Further, the extent of the compensation payable under art.94,

---

Requirements for National Solutions" in M. Bergström, M. Iacovides and M. Strand (eds), *Harmonising EU Competition Litigation* (Hart, 2016), pp.221, 222–226.

[48] *Donau Chemie* (C-536/11) EU:C:2013:366 at [22]–[25] (in French "*une compensation intégrale*"; in the language of the case, German "*vollständigen Ersatz*"); *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* (C-352/13) EU:C:2015:335 at [63].

[49] See, e.g. *Érsekcsanádi Mezőgazdasági Zrt v Bács-Kiskun Megyei Kormányhivatal* (C-56/13) EU:C:2014:352 at [60]–[65].

[50] *Arjona Camacho* (C-407/14) EU:C:2015:831, at [33]–[34]. The ECJ cited *Marshall II* (C-271/91) EU:C:1993:335 and *Paquay* (C-460/06) EU:C:2007:601.

[51] Art.94(2) of the Regulation 2100/94 on Community plant variety rights [1994] OJ L227/1: "Whosoever acts intentionally or negligently shall moreover be liable to compensate the holder for any further damage resulting from the act in question. In cases of slight negligence, such claims may be reduced according to the degree of such slight negligence, but not however to the extent that they are less than the advantage derived therefrom by the person who committed the infringement."

[52] *Hansson* (C-481/14) EU:C:2016:419 at [33]. See also at [30], [34].

> "must reflect, as accurately as possible, the actual and certain damage suffered by the holder of the plant variety right because of the infringement" ("*... refléter précisément, dans la mesure du possible, les préjudices réels et certains subis ...*"; "*... möglichst genau den Schäden entsprechen, die ... tatsächlich und sicher ... entstanden sind*").[53]

The ECJ underlined that the damage suffered is relevant, but not the profit made by the infringer, and that art.94 reflected the principle of "objective and full compensation".[54] The issue of relevant damage, including how to establish its existence and calculate it, is not discussed exhaustively in the Regulation, and the ECJ partially left these issues for the national court.[55]

In *Liffers*, the ECJ discussed full compensation in the context of Directive 2004/48 on the enforcement of intellectual property rights,[56] noting that full compensation is intended to include "moral prejudice", at least in this context: it must be possible to claim compensation for moral prejudice in addition to lump sum compensation based on hypothetical royalties. The ECJ found that in the light of the objectives of the Directive,

> "the first subparagraph of Article 13(1) of that Directive must be interpreted as establishing the principle that the calculation of the amount of damages to be paid to the holder of the intellectual property right must seek to ensure that the latter is compensated in full for the 'actual prejudice suffered' by him, which also includes any moral prejudice". (Similarly in French "*... la réparation intégrale du préjudice qu'il a 'réellement subi' en y incluant également l'éventuel préjudice moral survenu*", and in the language of the case, Spanish, " ...

[53] *Hansson* (C-481/14) EU:C:2016:419 at [35].

[54] *Hansson* (C-481/14) EU:C:2016:419 at [33], [41]–[43], [50], [56]. See also an earlier remark by AG Jääskinen in *Geistbeck and Geistbeck v Saatgut-Treuhandverwaltungs GmbH* (C-509/10) EU:C:2012:187 at [40]: "[O]ne should start from the assumption that the underlying objective ... is full compensation based on the principle of *restitutio in integrum*. In other words, the compensation which is payable when plant variety rights have been infringed is intended to return the holder of those rights to the situation that existed prior to the infringement. However, it is not so easy to apply that principle in this case because that situation can be restored either by reference to authorised planting or by taking into account the amount charged for the licensed production of the propagating material."

[55] *Hansson* (C-481/14) EU:C:2016:419 see at [25], [55]–[65]. At [55]: "[the injured] person must produce evidence which establishes that his damage goes beyond the matters covered by the reasonable compensation provided for in Article 94(1)". At [59]: "It is the referring court which must determine the extent to which the damage pleaded by the holder of the variety infringed can be precisely established or whether it is necessary to set a lump sum which reflects the actual damage as accurately as possible. In that context, default interest at the usual rate may be applied to the amount of the compensation for damage if that appears justified." The ECJ discussed the treatment of enforcement and legal expenses in more detail.

[56] Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L157/32.

la reparación íntegra del perjuicio 'efectivamente sufrido', incluido también en su caso el posible daño moral causado".)[57]

AG Wathelet noted in a different case that full compensation based on the Directive provision mentioned indeed includes moral prejudice, if proven – but that the concept of "reasonable compensation" in art.13(2) of the same Directive (and in art.9(3) of Regulation 207/2009[58]) excludes moral prejudice. The AG noted that the reasoning behind the distinction is that art.13(2) concerns less objectionable infringing activies, for which full compensation is not provided.[59] Indeed, under the pieces of particular legislation discussed, "reasonable compensation" differs from full compensation.

Returning to the EU liability case law line, it is observable in *Safa Nicu* that the mere annulment of an unlawful restrictive measure (in this case concerning the listing of entities subject to freezing of funds and economic resources as part of measures against the Islamic Republic of Iran) does not have to be considered sufficient in order to achieve full reparation for damage caused by the measure.[60] Non-material damage incurred in this case could be determined "according to a fair evaluation *ex aequo et bono*".[61]

Implications of Requiring Adequate, Commensurate or Full Compensation

Concepts and Connotations

As to the concepts themselves, full compensation may be said to be the clearest, requiring that all (legally relevant) damage is covered, whereas commensurate and adequate compensation are slightly more open. Hypothetically, one might consider compensation commensurate or adequate, even though it is not full. Commensurate and adequate compensation appear to include an element of discretion or valuation even in themselves, and the proportionality required by the concepts could be

[57] *Liffers v Producciones Mandarina SL and Mediaset España Comunicación SA* (C-99/15) EU:C:2016:173 at [25]–[26], see also [28].

[58] Regulation 207/2009 on the Community trade mark [2009] OJ L78/1.

[59] Opinion of AG Wathelet in *Nikolajeva* (C-280/15) EU:C:2016:293 at [47]–[48], [55]–[56]. Art.13(2) of Directive 2004/48: "Where the infringer did not knowingly … engage in infringing activity ... the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established." Art.9(3) of Regulation 207/2009 on the Community trade mark [2009] OJ L78/1: "The rights conferred by a Community trade mark shall prevail against third parties from the date of publication of registration of the trade mark. Reasonable compensation may, however, be claimed in respect of acts occurring after the date of publication of a Community trade mark application ...".

[60] *Safa Nicu Sepahan Co v Council* (C-45/15 P) EU:C:2017:402, e.g. at [47]–[53].

[61] *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [53] (the language of the case is English – in French the expression is " ... *une juste évaluation ex aequo et bono*"), [106]–[107]. See further *Safa Nicu Sepahan Co v Council* (T-384/11) EU:T:2014:986 at [83]–[92].

present without full coverage of damage. This is particularly true as regards adequate compensation: "adequate" may also connote "satisfactory, even though not optimal".[62] (As for ECJ preliminary rulings, the requirement of adequate compensation may have originated from inaccurate translation from French, but has become common in itself and also appears in cases where the original language is English.)

Whereas a requirement for full compensation clearly necessitates evaluation from the perspective of relevant damage, and only from that perspective, concepts such as commensurate and adequate compensation may also require the addition of further elements to the assessment. Hence, the question may arise, for instance, whether the amount of compensation should be significant enough so as to punish the party liable.[63] Nevertheless, as seen above, ECJ case law has emphasised *commensurateness with the damage* (even in adequate compensation cases).[64] Therefore, comparing the contemplated compensation to the harm sustained may be highly central for all the notions studied here. In any case, requirements for, for instance, "full" compensation are already elusive because monetary compensation often does not fully restore the pre-damage situation, as it does not turn back time, but only alleviates (some) implications of the damage ex post.[65]

One may note the existence of different, and even slightly contradictory, hints in EU case law as to how the notions of full, commensurate and adequate compensation compare to each other and as regards their interrelationships.

It appears that commensurate and full compensation are often interchangeable. Commensurateness is constantly discussed by reference to commensurateness with the harm incurred.[66] Furthermore, in preliminary rulings such as *A.G.M.-COS.MET* and *Brasserie* the preliminary ruling questions inquired about full compensation but the ECJ responded by requiring that compensation should be commensurate with the damage sustained. Additionally, requiring commensurate compensation has been coupled with the message that, for example, leaving loss of profit categorically out of the scope

[62] See also dictionary defitions: *OED Online*, OUP 2017, "commensurate" *www.oed.com/view/Entry/37046*; "adequate" *www.oed.com/view/Entry/2299* (both accessed 23 August 2017).

[63] The issue of functions of liability is discussed further in the following analysis Sections.

[64] See, e.g. *Pontin* (C-63/08) EU:C:2009:666; *Fuß* (C-429/09) EU:C:2010:717; *Arjona Camacho* (C-407/14) EU:C:2015:831.

[65] See also, e.g. W. Wurmnest and C. Heinze, "General Principles of Tort Law in the Jurisprudence of the European Court of Justice" in R. Schulze (ed.), *Compensation of Private Losses* (Sellier, 2011), pp.39, 53.

[66] In addition to the case law overview above, see, e.g. Opinion of AG Jacobs in *Svenska staten v Stockholm Lindöpark AB* (C-150/99) EU:C:2000:504 at [81], using "commensurate with the loss suffered" and "full compensation" interchangeably (the original language of the Opinion is English).

of compensation would not be compatible with EU law. This kind of incompatibility may also feature in conceptualisations of full compensation.[67]

On the other hand, as noted by commentators, stating that *total exclusion* of a certain type of harm or a *statutory compensation cap* is incompatible with EU law does not amount to imposing a requirement for full compensation in the sense of requiring, for instance, that all pure economic loss is always compensated for.[68] This brings us back to the remark that both full compensation and compensation commensurate with the damage remain vague as long as detailed specifications are lacking as to what losses should be compensated for and *in what circumstances*.[69] Indeed, no major difference necessarily exists between commensurate and full compensation in this respect.

Moreover, adequate and commensurate compensation may, at least in some instances, be synonyms or close to synonyms (and as expressions, their semantic field is equivalent or nearly so).[70] It is noteworthy, too, that whereas the English language versions of rulings use both the terms adequate and commensurate, in particular the French language versions appear to a significant extent to use one corresponding expression: ("*adéquate*").[71]

Some cases relatively clearly suggest that the ECJ may consider adequate and full compensation as referring to one and same thing. For instance, *Marshall II* entailed the remark that "compensation ... must be adequate, in that it must enable the loss and damage actually sustained ... to be made good in full".[72] Very similar in this respect, for instance, was *Arjona Camacho*.[73]

Regardless of the close ties between the concepts of full, adequate and commensurate compensation, differences may also be discerned between the notions and in how they are used by the ECJ.

As regards adequate compensation, in some instances its meaning may seemingly differ from full compensation in particular. For example, case law in which monetary compensation is denied discusses adequate compensation together with the idea that the situation in question may have been

[67] See also the full compensation requirement in *Donau Chemie* (C-536/11) EU:C:2013:366 (at [22]–[25]) with references to *Manfredi* (C-295/04–C-298/04) EU:C:2006:461 which for its part refers to, e.g. *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79.

[68] See M. Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart, 2004), pp.258–260; K. Oliphant, "The Nature and Assessment of Damages" in H. Koziol and R. Schulze (eds), *Tort Law of the European Community* (Springer, 2008), pp.241, 249–250.

[69] See also Dougan, *Remedies* (2004), pp.259–260.

[70] For case examples, see, e.g. *Paquay* (C-460/06) EU:C:2007:601; *Palmisani* (C-261/95) EU:C:1997:351.

[71] In addition to fn.9, see, e.g. *Paquay* (C-460/06) EU:C:2007:601 at [49]; *Pontin* (C-63/08) EU:C:2009:666 at [42]; *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213 at [94]–[95]; *Maso* (C-373/95) EU:C:1997:353 at [36]. See also, e.g. Opinion of AG Jacobs in *Lindöpark* (C-150/99) EU:C:2000:504 at [80]–[81].

[72] *Marshall II* (C-271/91) EU:C:1993:335 at [26].

[73] *Arjona Camacho* (C-407/14) EU:C:2015:831 at [33]–[45]. See also *Paquay* (C-460/06) EU:C:2007:601.

remedied sufficiently even though no financial compensation is awarded.[74] Moreover, concerning damage-causing measures by EU institutions in particular, an issue may be whether monetary reparation is needed or possible in addition to the annulment of a damage-causing measure in order to achieve *full* compensation.[75]

Furthermore, it has been suggested in legal literature that requiring adequate compensation may refer to the requirement of full compensation only in the particular context of equality in employment and discriminatory dismissal.[76] Whereas cases such as *Marshall II* and *Arjona Camacho* indeed concern those themes, it has to be said that adequate compensation may signify full compensation in other contexts, too. No clear definition of "not-full-compensation" is available for adequate compensation.[77] Moreover, requirements for full compensation and statements banning the exclusion of certain types of harm have, as illustrated, also become more common and central, for instance, in competition-infringement liability rulings and Member State liability cases such as *A.G.M.-COS.MET* and *Brasserie.*

In *Marshall II*, AG Van Gerven actually took the view that in order to guarantee efficient judicial protection, compensation must be "adequate in relation to the damage sustained but does not have to be equal thereto" (similiarly in the language of the Opinion, Dutch, "*in een passende verhouding staan tot de geleden schade maar hoeft daaraan niet gelijk te zijn*"). This was explained, in particular, by reference to the necessity of accepting varying decisions by national courts in the absence of EU harmonisation of liability issues.[78] This approach would have truthfully reflected the fact that in any case national perceptions of damage and causation, and on *establishing* those preconditions, centrally affect case outcomes. Thus, even full compensation could signify different things in different Member States. As we have seen above, the ECJ departed from the Opinion, presenting a vague demand for full compensation.

Some commentators have further noted that adequate compensation could amount to less than commensurate or full compensation. Indeed, there is no denying that case law includes passages which support that view.[79] In any case, using only one term to refer to adequate and commensurate

[74] See also fn.119.

[75] See in particular *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [47]–[49]. See also, e.g. *Abdulrahim v Council and Commission* (C-239/12 P) EU:C:2013:331 at [72]–[83], and discussion in the staff case *DD v FRA* (T-742/15 P) EU:T:2017:528 at [72]–[94].

[76] See, e.g. Oliphant, "Damages" in *Tort Law of the European Community* (2008), pp.251–253.

[77] See also further Opinion of AG Tesauro in *Brasserie* (C-46/93 and C-48/93) EU:C:1995:407 at [109]–[111]; Opinion of AG Lenz in *Agricola Commerciale olio Srl and Others v Commission* (232/81) EU:C:1984:287.

[78] Opinion by AG Van Gerven in *Marshall II* (C-271/91) EU:C:1993:30 at [17].

[79] See, e.g. Dougan, *Remedies* (2004), pp.258–259, highlighting *Maso* (C-373/95) EU:C:1997:353 at [41]; *Bonifaci* (C-94/95 and C-95/95) EU:C:1997:348 at [53]; *Palmisani* (C-261/95) EU:C:1997:351 at [34] (the last one also referring to making good loss or damage "to a sufficient extent").

compensation, in particular in the French versions of judgments plus in some original language versions, would seem to significantly diminish the difference between these notions and thus also between adequate and full compensation.

It is not impossible that differences may indeed exist between adequate, commensurate and full compensation, or that the meaning of these concepts is partially context-specific. However, pointing out such distinctions, or clear and exhaustive definitions of the concepts, is impossible given the current state of case law.

Even though full, adequate and commensurate compensation do not clearly and categorically signify the same thing, one possible conclusion is that often and to a significant extent they refer to the same kind of sufficiency of compensation. Similar assumptions have been made before, based on older and less comprehensive reviews of case law.[80] Regardless of potential connotational differences between the requirements, a remarkable similarity or interchangeability between them is also evident. In the case of full compensation, reparation must correspond to the harm suffered. On the basis of this review of case law, it may also be considered a central, if not the only, criterion in evaluating whether compensation is adequate or commensurate. It is noteworthy that requiring that compensation be sufficient "so as to ensure the effective protection of ... rights"[81] may also imply the requirement of full compensation or something close to it even when this is not expressly discussed. As is well known, the obligation to provide efficient judicial protection and the underlying requirement of the full effect of EU law set appreciable, even weighty, demands on national judgments.

As regards the *general or particular nature* of concepts related to the extent of liability in EU law, an issue which is not discussed here at length, it should be noted that particular secondary legislation and case law interpreting it may give a specific meaning to a concept so that that meaning is relevant in that particular context only. A cautious approach regarding the general significance of the interpretation of a term is advisable when it is evident that the ECJ is addressing the matter in a particular context, for instance, explaining a specific Regulation article that expressly uses the term under scrutinity.[82] Whether guidance applies to other contexts may be unclear, for instance, regarding more general remarks on adequate compensation in a case pertaining to a specific field such as equality in employment. In theory, any explanations by the ECJ regarding full, adequate and commensurate compensation shed light on the concepts as terms of EU law. Nevertheless, details of their connotations may also be context-specific in some instances.

[80] See, e.g. Oliphant, "Damages" in *Tort Law of the European Community* (2008), pp.249–250.

[81] As first expressed in *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [82].

[82] Consider, e.g. "reasonable compensation" in art.94(1) of Regulation 2100/94 on Community plant variety rights [1994] OJ L227/1. Compare to, e.g. discussion on full compensation, as a more general term, in *Hansson* (C-481/14) EU:C:2016:419.

At the moment, however, it appears that no obvious, clear-cut differences in meaning exist between different contexts or fields of law when the ECJ discusses full, adequate and commensurate compensation. The rulings available are sporadic, and the total volume of cases and the brief discussions observable in them do not allow for far-reaching conclusions to be drawn. This may be interpreted as reducing the relevance of the potential conundrum of "general" and "particular" but similar-looking requirements. If the currently highly pointillist case law develops further and more clearly distinguishes between different situations or fields of law, the problem deserves further attention.

Requirements Relating to the Extent of Compensation: Further Notes

Assessing Sufficiency of Reparation

The preliminary rulings reviewed constantly refer to more detailed rules in national systems for determining the actual scope of compensation. The *role of national procedural autonomy* and *room for discretion* may be regarded as both positive and negative. On the one hand, the apparently significant room for different national evaluations and solutions should signify that national courts may choose which ways of arriving at the outcomes required by EU law are the wisest and smoothest as observed from the national perspective. In any case, national courts can relatively easily comply with EU law, as the requirements are not particularly specific or "dense". On the other hand, that line of argument may be too optimistic as the "limits of acceptability" are partially cryptic and have also previously led to surprising new interpretations by the ECJ.[83] Predicting what complies with EU law may be challenging, leading to both "under-compliance" and "over-compliance", especially if new preliminary rulings are not requested.[84]

In terms of *yardsticks for sufficient compensation*, it is evident that full, adequate and commensurate compensation direct our attention to damage that must be made good. Depending on the functions of damages liability, other matters may potentially also be relevant, especially in the case of expressions such as adequate and commensurate compensation. But, starting from damage that should be made good, from the standpoint of law on damages or tort law, the question arises:

[83] As to new broadening interpretations of the procedural autonomy principles, see, e.g. Craig and de Búrca, *EU Law* (2015), pp.226–265; Prechal and Widdershoven, "Effectiveness" (2011) 4 *Review of European Administrative Law* 31; and, in terms of extent of liability in particular, K. Havu, "EU law in Member State Courts: 'Adequate Judicial Protection' and Effective Application: Ambiguities and Nonsequiturs in Guidance by the Court of Justice?" (2016) 8 *Contemporary Readings in Law and Social Justice* 158, 171–172.

[84] "Under-compliance" signifies not adapting national solutions enough to meet the requirements of EU law, and "over-compliance" that rules or interpretations of national law are set aside "in order to comply with EU law" even though EU law would not actually require that drastic measures be taken in the case in question.

what counts as legally relevant damage and what negative consequences of damage-causing behaviour are connected to damage-causing behaviour with a legally relevant causal connection?

Definitions of (legally relevant) damage and (legally relevant) causal link may be described as partially artificial crystallisations. These matters are also highly intertwined and may even be said together to form the conception of recoverable or relevant damages. In addition to real-life causal relationships, they are based on more intricate evaluations which include aspects such as the justness or fairness of imposing liability, the responsibilities of the causing and suffering party, valuation of different interests, and the level of reprehensibility connected to damage-causing behaviour.[85] Thus, the mere facts of a case never tell the extent and scope of appropriate damages liability directly, but only when assessed through the "legal construction eyeglasses" of relevant damage and causal link.

In ECJ preliminary rulings, determining the details of relevant damage is often left for national courts, on the basis of national laws and traditions.[86] Hence, for instance, what full compensation means in practice may in a concrete case be remarkably dependent on national choices and approaches: the question whether compensation is "full" is answered by examining whether reparation corresponds to the applicable idea of relevant damage.

Concepts such as "*causal link*" and "*direct causal link*" (or the requirements for proving a sufficient causal connection) have not been defined exhaustively in EU law, even though used in preliminary rulings like those on Member State liability, and in cases dealing with the damages liability of the EU itself. Additionally, commentators have recognised the obscurity relating to causal connection and to fulfilling the requirement of direct causation, noting, for example, that the EU notions of causal link or direct causal link are not clear and do not appear to fully correspond to causation tests used in national systems.[87] Moreover, in case law, an unsystemic or inexplicable

[85] See further, e.g. H.L.A. Hart and T. Honoré, *Causation in the Law,* 2nd edn (OUP, 1985), pp.62–129; W. Landes and R. Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987), pp.228–233.

[86] See, e.g. *X* (C-318/13) EU:C:2014:2133 at [43]; *Leth v Republik Österreich, Land Niederösterreich* (C-420/11) EU:C:2013:166 at [39]–[48]; *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* (C-446/04) EU:C:2006:774 at [219]–[220]; *Haim v Kassenzahnärztliche Vereinigung Nordrhein* (C-424/97) EU:C:2000:357 at [33]; *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [8], [14], [80]–[91]; *Otis* (C-199/11) EU:C:2012:684 at [65]–[66].

[87] See, e.g. Weitenberg, "Terminology" in *Tort Law of the European Community* (2008), pp.335–340; I.C. Durant, "Causation" in H. Koziol and R. Schulze (eds), *Tort Law of the European Community* (Springer, 2008), pp.47, 56–71; Reich, "Hybridization" (2007) 44 C.M.L. Rev. 726–729; P. Aalto, "Twelve Years of *Francovich* in the European Court of Justice" in S. Moreira de Sousa and W. Heusel (eds), *Enforcing Community Law from Francovich to Köbler: Twelve Years of the State Liability Principle* (Bundesanzeiger, 2004), pp.59, 72–76.

variation seemingly exists between "causal link" and "direct causal link" (or similar expressions, in French for example "*un lien de causalité*" and "*un lien direct*").[88]

Damage actually resulting from a breach of EU law should be compensated,[89] but it is partially unclear when the alleged damage is required to be a "direct" result of a breach and when even more indirectly resulting harm may be covered. Generally, a (direct) causal link refers to a breach of EU law being an immediate and exclusive, or at least necessary, cause of the alleged damage.[90] When evaluating the extent to which alleged damage was actually caused by an alleged breach, factors such as the claimant's own contribution to the damage, contributory negligence or failure to limit the damage[91], as well as other events "breaking" the causal relationship or competing causes of damage[92] may be taken into account. In liability cases dealt with by national judiciaries, the detailed significance attributed to and the application of elements like these, by no means simple undertakings, are left for national courts[93].[94] As a main rule, showing a causal link to a breach of EU law is the

[88] See, e.g. *Francovich and Bonifaci and Others v Italian Republic* (C-6/90 and C-9/90) EU:C:1991:428 at [40]; *Dillenkofer and Others v Bundesrepublik Deutschland* (C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94) EU:C:1996:375 at [27]; *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [51], [65], [74]; *Laboratoires pharmaceutiques Bergaderm SA and Goupil v Commission* (C-352/98 P) EU:C:2000:361 at [42]; *Perillo v Commission* (T-7/96) EU:T:1997:94. Furthermore, for example a recent EU liability judgment uses the expression "sufficiently direct causal nexus" (the language of the case is English – the French wording is "*un lien suffisamment direct*"): *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [61]–[62]. Note also, e.g. the ambiguous relationship between *Otis* (C-199/11) EU:C:2012:684 (at [65]) and *Kone* (C-557/12) EU:C:2014:1317.

[89] See, e.g. fnn.103–105. See also *Sommerlatte v Commission* (229/84) EU:C:1986:241 at [25]–[29].

[90] See fnn.87–88 and, e.g. *Brinkmann Tabakfabriken GmbH v Skatteministeriet* (C-319/96) EU:C:1998:429; *Trubowest Handel and Makarov v Council and Commission* (C-419/08 P) EU:C:2010:147 at [53]–[64].

[91] See, in particular, *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [84]–[85]; *Metallgesellschaft* (C-397/98 and C-410/98) EU:C:2001:134 at [101]–[107]. See also *Adams v Commission* (145/83) EU:C:1985:448 at [53]–[55]; *Oleifici Mediterranei v EEC* (26/81) EU:C:1982:318 at [16]–[24]; *Cobrecaf and Others v Commission* (T-514/93) EU:T:1995:49 at [67]; *Mulder and Others v Council and Commission* (C-104/89 and C-37/90) EU:C:1992:217 at [33]–[34].

[92] E.g. *Société pour l'Exportation des Sucres v Commission* (132/77) EU:C:1978:99; *Hamill v Commission* (180/87) EU:C:1988:474; *Perillo* (T-7/96) EU:T:1997:94; *Brinkmann* (C-319/96) EU:C:1998:429. Note, however, *Rechberger and Others v Republik Österreich* (C-140/97) EU:C:1999:306 at [67]–[76] (a Member State could not successfully rely on "causality breaking" factors related to a third party).

[93] E.g. *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [84]–[85], [90]; *Kone* (C-557/12) EU:C:2014:1317 at [21]–[24].

[94] As to causation under EU law, see also, e.g. A.G. Toth, "The Concepts of Damage and Causality as Elements of Non-contractual Liability" in T. Heukels and A. McDonnell (eds), *The Action For Damages In Community Law* (Kluwer, 1997), p.179; Durant, "Causation" in *Tort Law of the European Community* (2008), pp.51–79; Van Dam, *Tort* (2013), pp.321–324.

responsibility of the party claiming compensation. In cases heard by domestic courts, detailed evaluation as to whether it has been shown is mostly left for national laws and judiciaries.[95]

As regards "cause" or "direct cause" more generally in EU law, it may be noted, for example, that some cases illustrate that the ECJ might interpret "direct cause" rather narrowly.[96] It is unclear how relevant this is for evaluation in damages cases.

With respect to *potentially relevant damage and extent of compensation*, it is generally accepted that damage to persons and property as well as economic harm are compensable under EU law.[97] Additionally, the ECJ has stated that compensation should cover both actual loss and loss of profit, especially in the context of commercial litigation,[98] while the payment of interest may also be necessary and therefore cannot be excluded under national law.[99] Moreover, for example "moral prejudice" may be compensated at least in some contexts,[100] although the status of other mental suffering, inconvenience or dissatisfaction in different situations may be open.[101] In any case, damage

[95] E.g. *Leth* (C-420/11) EU:C:2013:166 at [42]–[48]. As to the complexity of the evaluation and potential for varying approaches, see, e.g. R. Rebhahn, "Non-contractual Liability in Damages of Member States for Breach of Community Law" in H. Koziol and R. Schulze (eds), *Tort Law of the European Community* (Springer, 2008), pp.179, 201–204.

[96] E.g. *Freistaat Sachsen v Germany* (C-57/00 P and C-61/00 P) EU:C:2003:510; *Germany v Commission* (C-156/98) EU:C:2000:467.

[97] See further, e.g. A. Vaquer, "Damage" in H. Koziol and R. Schulze (eds), *Tort Law of the European Community* (Springer, 2008), p.23; Oliphant, "Damages" in *Tort Law of the European Community* (2008), pp.256–270, with the case law cited.

[98] E.g. *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [87]; *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213 at [94]–[95].

[99] E.g. *Marshall II* (C-271/91) EU:C:1993:335; *Manfredi* (C-295/04–C-298/04) EU:C:2006:461 at [95]–[97]. The method of calculating interest must be compatible with EU law, but EU law is vague in defining acceptable calculations. See, e.g. *Irimie* (C-565/11) EU:C:2013:250.

[100] See, e.g. *Liffers* (C-99/15) EU:C:2016:173 at [25]–[26], [28]. See also *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [47]–[53], [104]–[106] (on "non-material damage").

[101] European systems may be said to have a reserved but not fully exclusive approach to compensating non-economic aspects of this kind of damage. There is little EU law that expressly includes or excludes this type of harm. A context for awarding damages has been staff cases, e.g. *Plug v Commission* (T-165/89) EU:T:1992:27. Note also, e.g. *Leussink* (169/83 and 136/84) EU:C:1986:371 which suggests that mental suffering of relatives of an accident victim is too *indirect* to be recoverable. See also discussion in *Staelen* (C-337/15 P) EU:C:2017:256. See further, e.g. Oliphant, "Damages" in *Tort Law of the European Community* (2008), pp.268–270, and Vaquer, "Damage" in *Tort Law of the European Community* (2008), pp.39–41 with the case law cited.

should, as a main rule, be quantifiable.[102] Compensation should cover damage actually sustained,[103] and damage must be actual and/or certain (or the like), or at least imminent and foreseeable, as well as specific.[104] Methods of calculating or determining recoverable damage should (in non-contractual liability and liability akin to non-contractual liability) answer the question: what negative consequences would not have appeared had a breach of EU law not occurred?[105] Although several potentially applicable methods may be available, the "correct" method may be open under EU law. Moreover, different methods may in practice lead to finding a different quantum of damages.[106] EU law does not, as a starting point, require punitive damages, even though the principle of equivalence may necessitate considering them[107].[108] Showing damage is generally the responsibility of the claimant. Again, in cases heard by domestic courts, detailed evaluation as to whether and to what extent damage has been shown is left for national laws and judiciaries.[109]

Potentially recoverable damage and sufficient causal connection often appear in ECJ preliminary rulings as a part of expressing *extreme outer borders* for acceptable national solutions, referring, for

[102] E.g. *Brazzelli Lualdi and Others v Commission* (T-17/89, T-21/89 and T-25/89) EU:T:1992:25. It may also be possible to base the award of compensation on an estimation or approximation (e.g. arts 17(1) and 12(5) of Directive 2014/104 on certain rules governing actions for damages for infringements of competition law [2014] OJ L349/1), on a lump sum (e.g. *Hansson* (C-481/14) EU:C:2016:419 at [64]), or, e.g. on "a fair evaluation *ex aequo et bono*" (e.g. *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [53]).

[103] See, e.g. *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213 at [94]–[95]; *Marshall II* (C-271/91) EU:C:1993:335 at [26]; *Mulder* (C-104/89 and C-37/90) EU:C:1992:217; *Mulder and Others v Council and Commission* (C-104/89 and C-37/90) EU:C:2000:38.

[104] E.g. *Hansson* (C-481/14) EU:C:2016:419 at [35]; *Safa Nicu* (C-45/15 P) EU:C:2017:402; *Council v De Nil and Impens* (C-259/96 P) EU:C:1998:224; *Münchener Import-Weinkellerei Binderer v Commission* (147/83) EU:C:1985:26 at [19]–[20]; *Roquette Frères v Commission* (26/74) EU:C:1976:69; *SA Métallurgique Hainaut-Sambre v High Authority* (4/65) EU:C:1965:130.

[105] See, e.g. *Hansson* (C-481/14) EU:C:2016:419 at [33]–[64]; *Kone* (C-557/12) EU:C:2014:1317 at [21]–[24]; *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213 at [94]–[96]; *Mulder* (C-104/89 and C-37/90) EU:C:1992:217; *Mulder* (C-104/89 and C-37/90) EU:C:2000:38.

[106] See, e.g. Opinion of AG Jääskinen in *Geistbeck* (C-509/10) EU:C:2012:187 at [40]; *Hansson* (C-481/14) EU:C:2016:419; *Fuß* (C-429/09) EU:C:2010:717; *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [8], [14], [81]–[96]; *De Nil* (C-259/96 P) EU:C:1998:224 at [32]–[33] and Opinion by AG Elmer EU:C:1997:367 at [44]–[50]. Note also the intricacies illustrated by, e.g. *Mulder* (C-104/89 and C-37/90) EU:C:2000:38.

[107] See, e.g. *Manfredi* (C-295/04–C-298/04) EU:C:2006:461 at [98]–[99].

[108] As to damages under EU law, see also, e.g. Oliphant, "Damages" in *Tort Law of the European Community* (2008), pp.249–250; Rebhahn, "Non-contractual Liability" in *Tort Law of the European Community* (2008), pp.204–208, 210–211; Craig and de Búrca, *EU Law* (2015), pp.261, 599–601.

[109] See, e.g. *Otis* (C-199/11) EU:C:2012:684 at [65]–[72]; *Hansson* (C-481/14) EU:C:2016:419 at [55]–[60]; Opinion of AG Wathelet in *Nikolajeva* (C-280/15) EU:C:2016:293 at [47]–[56].

example, to the full effect of EU law and the principles of effectiveness and equivalence. Analysing national approaches in the light of EU law "limits of acceptability" is thus central.[110] Additionally, guidance by the ECJ may often be characterised as pointillist.[111] These aspects mean that applying existing clarifications to future cases is difficult, thus creating legal uncertainty.

Which Lines of Case Law Provide Guidance?

In theory, *concepts of EU law on damages* may be clarified by different lines of case law (as often presupposed by commentaries), as there is likely some non-context-specific "general core" to central notions. Nevertheless, transferability of the entire reasoning between different types of damages cases (EU liability, Member State liability, and cases between individuals) is not necessarily entirely certain in the absence of explicit references between all the different contexts.[112] For instance, the transferability of reasoning in vertical liability cases to horizontal liability cases could be viewed with some reservation,[113] as well as the transferability of reasoning in cases heard by the EU Courts to cases heard primarily by national judiciaries.

In any case, the conditions for two types of vertical liability, namely EU non-contractual liability (art.340 of the Treaty on the Functioning of the EU, TFEU) and Member State liability, have, in principle, converged.[114] As a starting point, this signifies that reasoning in one of these case law lines is also relevant for the other. However, the significance of convergence is limited as regards the causation condition because of the role of national laws in State liability and the fact-intensity and casuistic nature of evaluation. Some cross-references nevertheless appear.[115] In terms of horizontal cases, it should be noted, for instance, that in *Manfredi*, Member State liability case law was relied on

[110] For case examples, see, e.g. fn.86. For discussion see, e.g. Oliphant, "Damages" in *Tort Law of the European Community* (2008), pp.249–254, 271; Aalto, "*Francovich*" in *Enforcing Community Law from Francovich to Köbler* (2004), pp.72–76; Havu, "Private Enforcement" in *Harmonising EU Competition Litigation* (2016), pp.222–226.

[111] See, e.g. *Kone* (C-557/12) EU:C:2014:1317 (unacceptability of categorical exclusion of damage suffered by so-called umbrella customers in a cartel context).

[112] For discussion, see, e.g. Durant, "Causation" in *Tort Law of the European Community* (2008), pp.55–56; Havu, "Horizontal Liability" (2012) 18 *European Law Journal* 411–425.

[113] See, e.g. A. Ward, *Judicial Review and the Rights of Private Parties in EU Law,* 2nd edn (OUP, 2007), pp.251–252.

[114] See in particular *Bergaderm* (C-352/98 P) EU:C:2000:361 at [41].

[115] See also, e.g. P. Aalto, *Public Liability in EU Law, Brasserie, Bergaderm and Beyond* (Hart, 2011), 11. Note, e.g. *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79 at [85] citing *Mulder* (C-104/89 and C-37/90) EU:C:1992:217.

in a discussion of the types of recoverable losses and lost profit.[116] Developments like these illustrate at least partial transferability of reasoning between different types of cases.

Thus, even this contribution has considered EU liability cases in addition to preliminary rulings while observing the use of expressions concerning sufficiency of compensation and the interpretation of damage and causal link.

Nonetheless, regarding the non-contractual liability of the EU, the General Court (GC) assesses facts and evidence, while appeals to the ECJ are restricted to errors of law.[117] This signifies that there is not much discussion by the ECJ on applying EU law to causation and damages in the EU liability case law line.[118] In turn, GC judgments should be studied keeping in mind that the GC is not the most authoritative interpreter of EU law but the ECJ is.

These remarks concerning the relevance of different lines of case law on the extent of compensation may be concluded by noting that national courts hearing damages cases should be ready to study EU law broadly in order to discern correct interpretations. That said, EU case law may be cryptic in both its substance and its relevance.

The Form and Functions of Compensation

Regarding the *form of reparation*, EU law does not necessarily refer to monetary compensation and damages liability when discussing "compensation". There are cases that consider other measures sufficient (and, for example, "adequate compensation") so that no financial reparation is needed. This is observable in EU staff cases and other EU liability disputes but also in some preliminary rulings.[119] Nevertheless, financial compensation and damages liability seem to be the primary contexts in which sufficiency of reparation is discussed. However, the issue of whether and in what situations

[116] *Manfredi* (C-295/04–C-298/04) EU:C:2006:461, e.g. at [95]–[97]. See also Havu, "Horizontal Liability" (2012) 18 *European Law Journal* 423–425.

[117] See art.256 TFEU and art.58 of the Statute of the Court of Justice of the EU, and, e.g. *De Nil* (C-259/96 P) EU:C:1998:224.

[118] See, however, e.g. *Trubowest* (C-419/08 P) EU:C:2010:147 at [51]–[64]; *Commission v Schneider Electric* (C-440/07 P) EU:C:2009:459 at [197]–[208], [221]; *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [52]–[53], [62]–[67], [73]–[80].

[119] E.g. *Campogrande* (C-62/01 P) EU:C:2002:248; *Hectors* (C-150/03 P) EU:C:2004:555; *RX-II M v EMEA* (C-197/09) EU:C:2009:804 at [32]; *DD* (T-742/15 P) EU:T:2017:528; *IPSO v ECB* (T-713/14) EU:T:2016:727; *Sison v Council* (T-47/03) EU:T:2007:207 at [241]; *Palmisani* (C-261/95) EU:C:1997:351; *Maso* (C-373/95) EU:C:1997:353; *Bonifaci* (C-94/95 and C-95/95) EU:C:1997:348; *Fuß* (C-429/09) EU:C:2010:717.

compensation other than monetary may suffice appears relatively open, thus adding to the ambiguities of the theme of appropriate compensation.[120]

As to the *functions of damages liability*, one may justifiably take as a starting point that, in EU law, the main function of damages liability is to compensate the victim – an idea which also underpins European law on damages more generally.[121] Nonetheless, closer inspection suggests that the issue of the many purposes of damages liability – for example goals of corrective justice or deterrence inter alia – and the emphasis placed on these different purposes is slightly more intricate.

For instance, the ECJ has expressed that the purpose of Member State liability is not deterrence or punishment but compensation for damage suffered by individuals as a result of breaches of EU law.[122] However, Member State liability, and liability in several other contexts, such as horizontal liability for competition law infringements or liability for breaches of equality law, has also been considered important because of the contribution to the full effect of EU law.[123] This argument is conceivably underpinned by ideas additional to (or other than) mere compensation, for example by the perception that the risk of liability also contributes to decreasing breaches of EU law.

Additionally, there is case law that discusses adequate and commensurate compensation combining rhetoric on compensation and sanction requirements or even expressing that damages liability is one option for sanctioning a breach of EU law. In particular, in the field of equality in employment, the ECJ adopted a mixed rhetoric in its early case law, which in turn was reflected by secondary legislation, which has contributed to mixed rhetoric appearing in some contemporary cases.[124] It can be said that the obligation of Member States to contribute to achieving the goals of the

[120] See also Dougan, *Remedies* (2004), pp.256–258. With respect to EU liability, consider also *Safa Nicu* (C-45/15 P) EU:C:2017:402 at [47]–[49]; *Abdulrahim* (C-239/12 P) EU:C:2013:331 at [72]–[83]; *Kendrion v EU* (T-479/14) EU:T:2017:48 at [129]–[135]; *Gascogne Sack Deutschland and Gascogne v EU* (T-577/14) EU:T:2017:1 at [152]–[165].

[121] As to EU cases, see, e.g. *Danske Slagterier v Bundesrepublik Deutschland* (C-445/06) EU:C:2009:178 at [31]; *Hansson* (C-481/14) EU:C:2016:419 at [46]; *Lucaccioni* (C-257/98 P) EU:C:1999:402 at [22].

[122] See *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213 at [88].

[123] See, e.g. *Francovich* (C-6/90 and C-9/90) EU:C:1991:428; *Courage* (C-453/99) EU:C:2001:465; *Levez* (C-326/96) EU:C:1998:577. For discussion, see, e.g. Wissink, "Overview" in *Tort Law of the European Community* (2008), pp.345–346; Van Dam, *Tort* (2013), pp.34–44.

[124] See, e.g. *Marshall II* (C-271/91) EU:C:1993:335 at [23]–[26]; *Von Colson* (14/83) EU:C:1984:153 at [18]–[24]; *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* (C-177/88) EU:C:1990:383 at [23]–[26]; *Pontin* (C-63/08) EU:C:2009:666 at [42]; *Paquay* (C-460/06) EU:C:2007:601 at [45]–[49]. See further, e.g. *Arjona Camacho* (C-407/14) EU:C:2015:831 and related Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] L039/40, as modified by Directive 2002/73 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards

EU[125] is a background force fuelling statements in the relevant early case law.[126] However, what this means for resolving details of damages liability in different situations is not fully clear. Even more generally, when and how sanction elements should be referred to when evaluating sufficiency of damages liability, and what kind of attention national courts should pay to the intricacies related to the role of damages liability in EU law, is to some extent open.

The slight ambiguities related to the functions of damages liability may constitute a challenging combination with the open nature of relevant damage, causal connection and sufficient compensation under EU law. Discerning "the required extent of liability" may be particularly difficult in situations where the (relevant emphases of the) functions of damages liability are uncertain. Where a function of damages liability is also to sanction a breach in addition to compensating the victim, it may be reasonable to include in the scope of compensation even those damages connected to breaches of EU law by multi-step and slightly uncertain causal links. If the function is purely and simply compensation, it may be reasoned that harm clearly resulting from an infringement and harm too remote to be included in that category should be studied more carefully, because even in theory, over-compensation cannot be legitimised.

---

access to employment, vocational training and promotion, and working conditions [2002] OJ L269/15. E.g. art.8d: "The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive." Recital 18 of Directive 2002/73: "The [ECJ] has ruled that, in order to be effective, the principle of equal treatment implies that, whenever it is breached, the compensation awarded to the employee discriminated against must be adequate in relation to the damage sustained. It has furthermore specified that fixing a prior upper limit may preclude effective compensation and that excluding an award of interest to compensate for the loss sustained is not allowed." Moreover, Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23, also discussed in *Arjona Camacho* (C-407/14) EU:C:2015:831, states in art.18: "Member States shall introduce … such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered." Art.25 of the same Directive: "Member States shall lay down the rules on penalties applicable to infringements … The penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive." See, moreover, discussion by AG Mengozzi in *Arjona Camacho* (C-407/14) EU:C:2015:534 at [18]–[53], noting, i.a., that in case law the requirement of *dissuasion* is satisfied if the compensation envisaged is *adequate*. As regards commentary on cases combining compensation and sanctions reasoning, see W. Van Gerven, "Of Rights, Remedies and Procedures" (2000) 37 C.M.L. Rev. 501, 530–535; D. Kelliher, "Aims and Scope" in H. Koziol and R. Schulze (eds), *Tort Law of the European Community* (Springer, 2008), pp.1, 9–15; Havu, "Ambiguities" (2016) 8 *Contemporary Readings in Law and Social Justice* 165–166.

[125] Now enshrined in art.4(3) TEU.

[126] See also M. Klamert, *The Principle of Loyalty in EU Law* (OUP, 2014), pp.125–129.

Is There a Need for More Precision as to Extent of Compensation?

Clearly, the requirements relating to the extent of compensation aim to function as a central guideline on what kind of reparation EU law necessitates. Clearly, too, the role of compensation is also seen as important by the ECJ in terms of the full effect of EU law and EU law being taken seriously in Member States. Nevertheless, the practical significance of statements on full, adequate or commensurate compensation depends greatly on other factors which are aspects of the surrounding system of law on damages. In EU law itself, these aspects do not appear highly advanced or their development is sporadic, casuistic and potentially context-specific.

Further matters which have not been fully explored in this study but which may be noted to be of practical relevance are standards and burden of proof and their details at the interface of EU and national law. In accordance with so-called procedural autonomy, national rules govern these matters in the absence of EU law. EU law requirements may set limits on national solutions concerning thresholds for proving conditions of damages liability. However, the relevant EU law on this issue is still more than somewhat vague and mainly highlights the blurry extreme outer borders of acceptable solutions, such as the principle of effectiveness.[127]

Evidently, the issue whether a need exists for more precision as regards full, adequate and commensurate compensation and the "surroundings" of the concepts in EU law deserves attention. When analysed in the broader context of EU law and its relationship to national remedies and procedures, so-called procedural autonomy and the prospective need for uniformity or harmonisation in the field of private law effects of EU law, arguments pointing in different directions arise.

National law on remedies and procedure must to some extent complement EU law for practical reasons: full harmonisation of these aspects would be nearly impossible.[128] Additionally, it may be proposed that the open-ended nature of EU law that intertwines with national law is not a problem because in the case of true unclarity, national judiciaries may request a preliminary ruling (art.267 TFEU). Nonetheless, the cases reviewed here illustrate that preliminary ruling requests for details of the required extent of compensation have been made, and indeed are still being made, but the responses may be vague and refer back to (in themselves challenging) principle-type outer limits for

[127] See, e.g. *Palmisani* (C-261/95) EU:C:1997:351; *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213; *Otis* (C-199/11) EU:C:2012:684; *Kone* (C-557/12) EU:C:2014:1317; *Arjona Camacho* (C-407/14) EU:C:2015:831; *Hansson* (C-481/14) EU:C:2016:419.

[128] For discussion, see, e.g. Van Gerven, "Unification" in *Towards a European Civil Code* (2004), p.101; Dougan, *Remedies* (2004), pp.258–260; Van den Bossche, "Private Enforcement" (2014) 33 *Yearbook of European Law* 41; Craig and de Búrca, *EU Law* (2015), pp.264–265.

decisions by national courts. Some cases seem to clearly evidence that national courts do find EU law of this theme cryptic and wish for clearer instructions.[129]

Morever, Member State courts may not recognise the relevant ambiguities of EU law if they jump to conclusions and decide a case using, for instance, the notion of full compensation as they understand it, applying national conceptions on recoverable damages and their sufficient connection to damage-causing behaviour where EU law is (apparently) silent. This is not a problem if the correct interpretation of EU law is that such a national decision in any case complies with all the demands of EU law. However, the relevant EU law is intricate and the interface between EU and national law complex.

For example, it is evident in several cases that regardless of demands for full compensation, in practice obtaining compensation depends on whether the national court accepts the claimant's view on causal connection, that is, that the damage claimed is a result of a breach of EU law.[130] A finding that a causal connection has not been proven, or that other causes contributed to the damage more than an alleged breach of EU law, or that other events broke the causal link between the breach of EU law and damage, may easily limit the scope of relevant damage, or even lead to denial of compensation entirely. It is challenging to deduce in what situations such findings by national courts comply with EU law. For example, the question arises: when would reliance on EU law be rendered excessively difficult or practically impossible (contrary to the principle of effectiveness) by requiring the claimant to prove that no event other than a breach of EU law caused alleged damage? "Proving negatives" is inherently difficult, for instance in the context of lost profit. Or, is it contrary to EU law to apply such a concept of causal relationship and such a threshold for proving it that in practice almost no claimant succeeds in showing a sufficient causal relationship to lost profit? Or, is it enough if 10% of claimants succeed? This list of examples could go on, but these highlights probably already illustrate the matter: in a nutshell, awarding "full compensation" to *successful claimants* does not automatically signify that EU law would achieve its intended effects to a sufficient degree.

Therefore, the idea that EU law achieves its intended effects as long as national courts issue decisions that apply some ideas of full, adequate or commensurate compensation may be too optimistic. A significant potential exists for variation as regards the end results of damages claims. In principle it may be said that national courts apply "full compensation" even when they repeatedly find that there is no relevant, causally connected damage (if there were, it would be compensated fully).

[129] E.g. *Brasserie* (C-46/93 and C-48/93) EU:C:1996:79; *Bonifaci* (C-94/95 and C-95/95) EU:C:1997:348; *Kone* (C-557/12) EU:C:2014:1317; *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213. See also, e.g. *Giovanardi and Others* (C-79/11) EU:C:2012:448.

[130] E.g. *Hansson* (C-481/14) EU:C:2016:419; *Liffers* (C-99/15) EU:C:2016:173; *Kone* (C-557/12) EU:C:2014:1317; *A.G.M.-COS.MET* (C-470/03) EU:C:2007:213; *Palmisani* (C-261/95) EU:C:1997:351; *Maso* (C-373/95) EU:C:1997:353. See also Opinion of AG Wathelet in *Nikolajeva* (C-280/15) EU:C:2016:293 at [48].

However, this does not signify that national decisions would be in accordance with the goals that lie behind emphasising sufficient compensation in the ECJ's reasoning.

This contribution does not attempt to answer the questions of whether and how – by case law, legislation or using a combination – EU law on sufficient compensation and relevant losses should be developed.[131] The difficulty of developing an "EU law on damages", especially for cases resolved by national courts, is that issues such as recoverable damage and sufficient causal relationship require highly casuistic evaluation based on the facts of the case in question. Nonetheless, the findings of this study call for true interest in the matter on the part of the ECJ and the European legislator, as well as for further research.

More concrete guidance in individual cases would both help referring courts and provide more material, even if partially casuistic, for other judges and parties pondering what kind of liability could and should be triggered by infringements of EU law. Furthermore, explaining in more detail what, for instance, full compensation means from the perspective of relevant losses and causal links in different circumstances would contribute to formulating (more elaborate) basic principles and doctrines of EU law on damages.

Concluding Remarks

This article has studied the requirements for full, adequate and commensurate compensation in the case law of the ECJ, especially as regards guidance presented in preliminary rulings. Full, adequate and commensurate compensation appears, at least often and to a significant extent, to refer to the same kind of sufficiency of reparation, namely full compensation. Nonetheless, no clear, exhaustive picture emerges from the concepts, their interrelations and potential "special connotations" applicable in particular contexts only. The varying terminology on sufficiency of reparation is inherently likely to create uncertainty.

The overall picture of damages liability required by EU law appears somewhat blurred. On the one hand, it leaves room for divergence and, on the other hand, it may function as a potential source of confusion and, as should be noted by national courts, a justification for new preliminary ruling requests.

Requiring full, adequate or commensurate compensation is an important message. Nevertheless, if demands for sufficient compensation are made in a context where the definition of relevant damage and the circumstances in which it should be compensated are open, the message is undermined and case outcomes divergent. This issue may be accentuated by the possibility that national courts are puzzled as to which functions of damages liability – compensation, deterrence and/or sanctioning – they should place the emphasis upon in the cases before them.

[131] For discussion, see, e.g. fn.128.

If requirements for sufficient compensation, such as those studied in this article, are presented with the aim of achieving a certain degree of uniformity, they should be coupled with more elaborate guidance on what is considered legally relevant damage and on how to conclude whether a sufficient causal link is present, preferably including discussions on standards and burden of proof. Even though this is not evident in most of EU law, these considerations are typically highly complex in the law on damages and liability disputes.[132]

It may be argued that national laws that fill gaps in EU law are likely to lead to satisfactory results from the EU law perspective. However, a degree of counterintuitiveness seems to be present in the idea that the goals and sufficient effects of EU law are always achieved when a national court awards compensation which it considers "full", even though what should be fully covered had been established by relying strongly on national perceptions and traditions, with an extremely vague contribution from EU law.[133] It would seem reasonable for EU law to better appreciate the fact that the guiding nature of expressions such as adequate, commensurate or full compensation significally depends on the accuracy of other aspects of the law on damages and on procedural norms.

[132] See also, e.g. M. Tomulic Vehovec, "The Cause of Member State Liability" (2012) 20 *European Review of Private Law* 851.

[133] See also, e.g. Van den Bossche, "Private Enforcement" (2014) 33 *Yearbook of European Law* 48–83. See, furthermore, remarks on the role of Member State liability as a complement to inadequate national remedies: Craig and de Búrca, *EU Law* (2015), p.264, citing, i.a., Dougan, *Remedies* (2004), pp.258–260. It should be noted that remedying the inadequacy of national law might in practice fail if central Member State liability issues are also resolved sub-optimally.